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Final Word on the Bahlul Brief

By **Peter Margulies** Wednesday, July 31, 2013, 7:11 AM

Steve's latest insightful and well-argued comments on Former Government Officials and Military Lawyers' amicus brief in *al Bahlul* highlight one important difference between us, but obscure that issue with other arguments that are more easily resolved. I'll address these preliminary points first, and then address the really significant difference.

Despite what Steve contends (citing Kevin Jon Heller here) the dropped "enterprise" language in the indictment dealt with RICO-style enterprise liability, not with Joint Criminal Enterprise (JCE). (See my last post for the details.) *Amici* have never argued that the RICO language, which would have based liability on merely joining Al Qaeda, has anything to do with war crimes. Second, Steve asserts that the MCA lacks a section authorizing "jurisdiction to try any offense made punishable by this chapter or the law of war." MCA section 948d(a) authorizes just that.

Third, Steve asserts that the Court of Appeals for the Armed Forces' decision in *United States v. Morton* decision undercuts amici's case for functional notice in military commissions, because *Morton* bars findings of guilt for a "closely related offense" that was not charged. However, one can also read *Morton*, which features a characteristically thoughtful opinion by Judge Baker, more narrowly. In *Morton*, the CAAF vacated a conviction for obstructing justice that the trial court had imposed on a defendant who in a guilty plea had allocuted only to making false official statements. The trial court had followed precedent that allowed the trial court to use the allocution on one charge as the basis for additional convictions for related offenses. The CAAF overruled this precedent, stressing that a plea must be both knowing and voluntary. A conviction based on an allocution for another offense would be neither. However, voluntariness is not a component of convictions after a trial, so a narrow reading suggests that *Morton* might not even apply to the trial context.

Caveats aside, *Morton* and other military justice cases on notice may stand for a broader proposition, which gets closer to the heart of the difference between Steve and *amici*. Steve asserts that both ordinary civilian prosecutions and military justice matters involving U.S. service members require greater formality as to the pleading of offenses. One could grant this point and still argue that military commissions need not require the same level of precision, as long as the defendant has actual notice of the charges against him. The difference may rest on the historic informality of law of war commissions, which have long adjudicated violations of custom, not statute. As the Supreme Court's decision in *In re Yamashita* said, "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment."

In addition, the elaborate nature of findings in military commissions may justify a less formal approach to charges. Members of the commission in *al Bahlul*'s case made specific findings on his administration of the *bayat* to Mohammad Atta and Ziad al Jarrah. The specific findings are a window into the members' decisionmaking that we often lack for ordinary civilian juries. The duty to issue specific findings regarding guilt may offer an additional safeguard against arbitrariness, bias, or error. That safeguard may lessen the risks of less formal charging, at least when the defendant had the adequate notice that *al Bahlul*'s frequent colloquies with the court revealed.

Informality has limits, of course. A defendant in a commission should never be convicted of an offense that is factually different from the one charged. In *al Bahlul*'s case, the charges, the opening statement, and the commission members' findings meshed. Moreover, the completed crime of 9/11 cited in the list of overt acts was not a low-profile event whose occurrence may have slipped the mind of a defendant. Instead, it was one of the most infamous crimes in history – one in which the defendant had repeatedly acknowledged his own role.

Steve believes that greater formality in charging is a necessary safeguard both in civilian and military justice and in military commissions. He worries that permitting greater informality in commissions, even where defendants have notice of the charges, would yield a return to the lapses in procedure in *Yamashita* highlighted by Justice Stevens in *Hamdan II* and Justice Kennedy in *Boumediene v. Bush*. I would readily concede that the commission in *Yamashita* had an array of procedural flaws. In finding that the defendant had failed to exercise command responsibility over troops engaged in wartime atrocities, the Supreme Court turned a blind eye to the absence of properly authenticated evidence. The Court also glided over the absence of evidence that the defendant had known or should have known about his troops' abusive conduct.

Steve believes that informality is a recipe for *Yamashita* redux. *Amici* contend, in contrast, that there's a middle ground in military commissions that takes a defendant's actual notice into account. In *al Bahlul*'s case, since a conspiracy and overt acts were pleaded, the missing piece is the pleading of defendant's responsibility for a completed crime. For Steve and Kevin, that renders the conviction fatally flawed. For functionalists, in contrast, the charging document's list of specific overt acts linked to 9/11 fills the gap. In *al Bahlul*'s case, that's all the Define and Punish Clause and the Ex Post Facto Clause require.

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of *Law's Detour: Justice Displaced in the Bush Administration* (New York: NYU Press, 2010).